

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

S.A.M.

DATE: June 17, 2019

TO: Mori Rubin, Regional Director
Region 31

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Providence St. John's Health Center
Case 31-CA-234186

530-6067-4033-2500
530-6067-4033-6700
530-6067-4033-7100
530-8054-0100
530-8054-0133
530-8054-0167

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) of the Act by failing to give employees an annual wage increase in the year following the contract's expiration, where the contract separately described the wage increases for each of the contract's three years. We conclude that the Employer violated Section 8(a)(5) because the annual wage increase was an established practice that predated, and continued under, the contract, and the applicable contractual language did not limit annual increases to the contract's term. Therefore, the post-expiration "status quo" was to continue the practice of granting annual wage increases, and the Employer violated the Act when it unilaterally withheld the increases. Additionally, in pursuing this matter before the Board, the Region should urge the Board to overrule *Finley Hospital*¹ for the reasons described below.

FACTS

The California Nurses Association (Union) has represented over 500 registered nurses at Providence St. John's Health Center (the Employer) since 2011. The

¹ 362 NLRB 915, 919 (2015) (finding that employer unlawfully withheld annual pay increase following expiration of one-year contract that delineated a single pay increase and contained explicit durational language, because no clear and unmistakable waiver concerning post-expiration pay increases), *enforcement denied in rel. part.*, 827 F.3d 720 (8th Cir. 2016).

Employer granted nurses annual wage increases in October of 2012 and 2013 during the parties' initial contract, which was effective from October 29, 2012 through October 28, 2014. The Employer failed to grant the October wage increase in 2014, because the contract was expiring. The Region issued a complaint in that case (Case 31-CA-076677), alleging that the Employer violated Section 8(a)(5) by unilaterally withholding the annual wage increase, and the affected nurses ultimately received backpay as part of a non-Board settlement.

The parties' most recent collective-bargaining agreement was effective July 26, 2015 through July 25, 2018. Article 19 (Wages) stated that "[t]he only base rate pay increases for Employees shall occur in Contract Years 1-3 as described below. There shall be no Employee anniversary date increases." The provision then listed the percentage wage increase for employees in Contract Year 1 (Oct. 2015), Contract Year 2 (Oct. 2016), and Contract Year 3 (Oct. 2017). These wage increases were also set out in an "experience step schedule" that listed specific annual wage increase amounts based on nurses' years of experience. The Employer granted these wage increases each October when the contract was in effect but failed to grant them in October 2018 following the contract's expiration. The parties are currently bargaining for a successor contract.

ACTION

We conclude that the Employer violated Section 8(a)(5) by failing to grant the annual wage increase in October 2018 after the contract expired because the wage increase was a practice that predated, and continued under, the contract, and the applicable contractual language did not limit the increase to the duration of the contract. Therefore, the post-expiration "status quo" was to continue the practice of granting annual wage increases, and the Employer violated the Act when it unilaterally withheld the increases. Additionally, in pursuing this matter before the Board, the Region should urge the Board to overrule *Finley Hospital* for the reasons described below.

Most terms and conditions of employment contained in an expired collective-bargaining agreement continue in effect post-contract expiration until the parties bargain to a subsequent agreement or impasse.² The Board generally applies the "clear-and-unmistakable-waiver" standard to determine whether contractual language permits the employer to unilaterally change terms or conditions of employment that would ordinarily survive contract expiration, and such waiver has

² *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 206 (1991) (citing *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 25-27 (2d Cir. 1988)).

generally been found only when a provision in an expired contract expressly indicates that the term will not continue post-expiration.³

In *Finley Hospital*, the Board applied waiver principles and found that language contained in an initial one-year contract, which limited wage increases to the “duration of this agreement” and “during the term of this Agreement,” did not clearly waive the union’s right to bargain over the employer’s post-expiration cessation of the annual wage increases.⁴ The Board majority concluded that such language, while specifically terminating the union’s *contractual* rights to such increases, would not be “a clear and unmistakable waiver of the union’s separate *statutory* right to maintenance of the status quo.”⁵

Member Johnson, dissenting in part, argued that “waiver” was not the proper analysis in that case; “[r]ather, the proper inquiry is to identify the statutory status quo for wages that the [employer] was obligated to maintain pending bargaining for a successor contract,” which is “defined by ‘the contract language itself.’”⁶ Member Johnson further argued that the parties’ “insert[ion of] the time-bound expiration phrase ‘during *the term of this Agreement*’ into the midst of the very wage increase provision at issue in this case” was sufficiently clear to establish that the post-expiration status quo did not include annual wage increases.⁷ Member Johnson added that, unlike situations where the employer discontinued a longstanding practice of granting annual wage increases after contract expiration, “the status quo

³ See *Cauthorne Trucking*, 256 NLRB 721, 722 (1981) (language in pension trust agreement stating that “at the expiration of” a collective-bargaining agreement, the employer’s pension obligations “shall terminate” unless the pension obligations continue under a new agreement), *enforcement granted in rel. part*, 691 F.2d 1023 (D.C. Cir. 1982); *Oak Harbor Freight Lines, Inc.*, 361 NLRB 884, 884 (2014), *reaffirming* 358 NLRB 328, 328 n.1, 340 (2012) (language in collective-bargaining agreement “clearly and unambiguously privilege[d] the employer to discontinue trust contributions” after contract expiration and written notice to union, which thereby waived union’s right to bargain over cessation of fund payments upon those two events’ occurrence), *enforced*, 855 F.3d 436 (D.C. Cir. 2017).

⁴ *Finley Hospital*, 362 NLRB at 917.

⁵ *Id.* (emphasis added).

⁶ *Id.* at 926 (Member Johnson, dissenting in part) (quoting *Intermountain Rural Elec. Ass’n v. NLRB*, 984 F.2d 1562, 1567 (10th Cir. 1993)).

⁷ *Id.* at 927 n.4 (Member Johnson, dissenting in part) (emphasis in original).

obligation the majority seeks to perpetuate is based solely on a negotiated wage increase that the parties agreed would be granted for the *1 year of the contract term*.”⁸

Similarly, in denying enforcement of the *Finley* majority’s decision and finding that the employer lawfully discontinued the annual pay increase, the D.C. Circuit concluded that a “singular pay raise delineated in a CBA that contained an explicit term limit” was not enough to establish a status quo, and therefore the court did not “need [to] address whether the [u]nion waived its alleged statutory right to post-expiration raises.”⁹

The General Counsel is of the view that the Board majority’s opinion in *Finley* was wrongly decided and should be overturned. He agrees with Member Johnson and the D.C. Circuit that the *Finley* majority incorrectly determined that the status quo required annual wage increases—even though the provision at issue was contained in a one-year contract, called for a one-time increase, and contained clear durational language, and the employer had no prior practice of granting annual raises—and that the majority conducted an unnecessary and inappropriate waiver analysis. Contrary to the *Finley* majority’s analysis, the status quo should be determined by reference to the design and wording of the relevant contractual provision and evidence concerning any past practice, and a waiver analysis is not appropriate in these circumstances.

Applying that standard here, we conclude that the Employer violated Section 8(a)(5). Unlike in *Finley*, the status quo here included annual October wage increases, as demonstrated by the Employer’s longstanding practice of granting annual raises in October, as to which the basis for the increase amount (experience) has been constant, and where the increases occurred with “such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or reoccur on a regular and consistent basis.”¹⁰ And, unlike in *Finley*, there is no clear language in the expired contract limiting continued annual wage increases to the contract’s duration. Parties to collective bargaining can agree that a practice will not continue beyond the term of their contract, and words in an agreement should be accorded their normal meaning in determining what the parties intended. But the contractual language here does not demonstrate that the parties intended that the practice would end at contract expiration. Although the expired contract stated that the “only base pay increases” would occur during contract years 1-3 “as described below,” this was most likely intended as a delineation of the exact increases that would be paid in each of the three contract years, given the reference to specific percentage wage increases for each experience level set forth immediately below that language, rather than a

⁸ *Id.* at 927 (Member Johnson, dissenting in part) (emphasis in original).

⁹ *Finley Hosp. v. NLRB*, 827 F.3d at 726.

¹⁰ *Sunoco, Inc.*, 349 NLRB 240, 244 (2007).

statement that annual wage increases would *only* occur during the three years of the contract. That interpretation is further bolstered by the provision's statement that there would be "no [e]mployee anniversary date pay increases," which clarified that the parties' purpose in identifying these increases as the "only" wage increases was intended to codify that raises would come only in October and not on nurses' anniversary dates. There is no language in the expired agreement that demonstrates the parties intended that October wage increases would only be paid during the term of the contract.

Since the status quo included yearly October wage increases, and the parties did not agree to limit those wage increases to the term of the contract, the Employer violated Section 8(a)(5) by unilaterally failing to grant the increases in October 2018.

Accordingly, a Section 8(a)(5) complaint should issue, absent settlement.

/s/
J.L.S.

ADV.31-CA-234186.Response.StJohns. (b) (6), (b) (7)